

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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| FULLER, | . |
| | . |
| Plaintiffs, | . |
| | . Case No. 17-cv-07877 |
| vs. | . |
| | . Newark, New Jersey |
| INSYS THERAPEUTICS, INC., et | . January 5, 2018 |
| al., | . |
| | . |
| Defendants. | . |

TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE STEVEN C. MANNION
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

| | |
|--------------------|---|
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Proceedings recorded by electronic sound recording (not all parties were discernible on the record); transcript produced by transcription service.

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1 (Commencement of proceedings at 12:17 P.M.)

2

3 THE COURT OFFICER: We are on the record in the
4 matter of Debra Fuller versus Insys Therapeutics, et al.,
5 Docket Number 17-cv-07877.

6 THE COURT: All righty. Appearances, beginning
7 with plaintiff's counsel.

8 MR. HOLLAWELL: Richard Hollawell from Console &
9 Hollawell on behalf of the estate of Sarah Fuller.

10 THE COURT: All right. Welcome.

11 MR. DEWLAND: Mark C. Dewland from Console &
12 Hollawell on behalf of the estate of Sarah Fuller.

13 THE COURT: Welcome.

14 For Insys?

15 MR. SCHWARTZ: Adam Schwartz with Carlton Fields on
16 behalf of Insys.

17 MR. CRAWFORD: And Philip Crawford, Judge, from
18 Gibbons also on behalf of Insys.

19 THE COURT: Okay. All right. So we had a
20 discussion off the record. We had our Rule 16 scheduling
21 conference off the record. We also had counsel appearing for
22 Linden Care and represented to the Court that plaintiff and
23 Linden Care have settled, entered a confidential settlement,
24 which should be consummated within three weeks; and that
25 there's no objection to the dismissal of Linden Care from any

1 of the other defendants; that there would be, I believe, an
2 apportionment as to Linden Care if the case proceeded to
3 trial as to the other defendants.

4 Is that your understanding on behalf of plaintiff?

5 MR. HOLLAWELL: Yes, Your Honor.

6 THE COURT: Is that your understanding on behalf of
7 Insys?

8 MR. SCHWARTZ: Yes, Your Honor.

9 THE COURT: Okay. All right. So we'll get a
10 stipulation of partial dismissal without prejudice to file
11 for Linden Care shortly. And then once the paperwork is
12 consummated, a stip of partial dismissal as to Linden Care
13 with prejudice.

14 So up next, we have plaintiff's motion to remand
15 back to state court. Who would like to be heard for
16 plaintiff on this?

17 MR. HOLLAWELL: Richard Hollawell, Your Honor.

18 THE COURT: All righty, sir. It's your motion.
19 Please proceed.

20 MR. HOLLAWELL: Your Honor, as plaintiffs pointed
21 out in the moving papers for remand, there is -- there are
22 parallel proceedings that are taking place that -- well,
23 common facts, substantial -- the parties, and claims that
24 exist. In fact -- Matalon, who was once a defendant in this
25 case, has settled, who now has an action against Insys

1 Therapeutics for the very actions that Insys committed,
2 mainly in regards to Sarah Fuller, for fraud it committed to
3 mislead her into the proper use for Subsys. They
4 switched-and-bait documents, they changed documents. Then
5 last week, they called Ms. Fuller's insurance company -- or
6 Medicare, and -- the -- for Medicare, unbeknownst to
7 Dr. Matalon --

8 THE COURT: This is not in your papers, is it?

9 MR. HOLLAWELL: --

10 THE COURT: Okay.

11 MR. HOLLAWELL: The -- as far as the written
12 criteria as to call -- some number the call came from and the
13 certification of the -- from EnvisionRx. I'll tell you what
14 exhibit that is -- Exhibit --

15 THE COURT: Okay.

16 MR. HOLLAWELL: Plaintiff's -- and Insys's reply.

17 So the drug company called saying, this is
18 Dr. Matalon's office calling, and we're calling because we
19 need to get your approval and your authorization for this
20 drug fentanyl that is only approved for end-of-life cancer
21 patients. And in the call, the representative from Insys
22 also lied, made fraudulent statements about Ms. Fuller's
23 medical condition and misrepresented that she needed this
24 drug for breakthrough cancer pain.

25 That led to the allowance of this drug to get to

1 Sarah Fuller. From there, she went on to have 14
2 prescriptions, one a month. There was a carton of fentanyl
3 that would come to her doorstep, shipped by Linden Care. And
4 the 14 prescriptions, she -- within the carton, there was,
5 like, 12 individual boxes. And she would then -- one box, a
6 couple of the vials that you spray onto your tongue, and she
7 nearly --

8 And the remainder of the box is -- it's been
9 retained, and, you know, that's what happened. So there was
10 no -- there was no taking of the entire carton that led to
11 her death.

12 So Dr. Matalon has now sued Insys regarding what
13 transpired. Very similar to the allegations that were all
14 made as to Insys by the estate of Fuller as to their common
15 scheme, the people involved, the drug rep, I believe
16 Ebu-Isaac, that's -- actually Dr. Matalon named her as a
17 direct defendant. That was the drug rep. And she's a New
18 Jersey resident. And I have the affidavit of Dr. Matalon's
19 counsel, I believe Jack Meyerson, and that's under Exhibit L,
20 where he affirms that these were common issues, common
21 witnesses, and that the cases need to be consolidated. It
22 just wasn't able to get consolidated because Mr. Crawford
23 filed the removal action before attempting to consolidate
24 these two actions.

25 And, of course, Insys did not disclose to the

1 Court -- that they knew about well before the notice of
2 removal.

3 And -- the State of New Jersey has sued Insys
4 Therapeutics for its fraud, identifying a lot of the same
5 people involved. They're going to be the same witnesses that
6 are going to be involved in the Fuller case. As I advised
7 the Court in our conference, we are going to be naming John
8 Kapoor. State of New Jersey has named John Kapoor
9 individually, in addition to the corporate entity; Alex
10 Burlakoff; and Michael Babich. And obviously, they're all
11 going to be -- needed to be deposed in this case; again, all
12 involved around Insys's business practices with getting --
13 providing this information to the medical community, ordering
14 documents after they took documents back from physicians'
15 offices, making calls, claiming they were calling from
16 doctors' offices to get approval from the insurance
17 companies -- none of this work if they didn't get approval.
18 And that's all they've got in the State's complaint, as well,
19 that their actions and the kickbacks and the State's
20 complaint is -- in large part references what happened with
21 Sarah Fuller.

22 There are parallel proceedings, Your Honor, that
23 are taking place all over Middlesex County. And, again, I
24 just -- you know, I think it's important to note to the Court
25 that Insys knew about this because the State has been

1 investigating Insys for the last year. And Mr. Crawford's
2 firm's been involved with that investigation. They're
3 counsel, for instance, in the state case. They never advised
4 the Court that the State was filing suit because the State
5 suit was filed the day after the notice of removal on
6 October 5th.

7 So there's a lot that Mr. Crawford's office and
8 Insys's counsel did not tell the Court when they filed the
9 removal matter. And this is going to be a mess, these cases
10 are, in different courts and different jurisdictions. The
11 Matalon case clearly involves the drug rep. I need to depose
12 the drug rep as well, that -- with Sarah Fuller -- that -- if
13 this drug was appropriate for her, as instructed by her
14 superiors. The representative that made the fraudulent phone
15 call, obviously, Dr. Matalon wants that witness, and -- who
16 stated that they were a staff member from her office, and, of
17 course, that's a key witness in my case. We know who she is,
18 for the most part, Gina Flores [phonetic]. Unless, Insys is
19 able to provide me with someone else's name, but that's what
20 the evidence points to. And all the executives are going to
21 be deposed in all these cases -- indictment.

22 So all this stuff about the same facts, the same
23 evidence, the same witnesses, and -- briefed, the Court
24 cannot exercise supplemental jurisdiction over either of
25 those cases, the State's case, and the Matalon case,

1 that's -- where she named Ebu-Isaac, the drug rep, that's New
2 Jersey citizens.

3 And Insys's argument is consolidation did not
4 happen yet, which is true. But that's because Insys was
5 sitting on the case, they knew about the case, and Insys very
6 well knew that these cases were identical. And Insys is
7 moving -- or Insys's response to plaintiff's motion is that
8 the cases are different. And that is just a falsehood and is
9 a misrepresentation, right to the horse's mouth, and that's
10 Matalon's attorney, and, you know --

11 THE COURT: Okay.

12 MR. HOLLAWELL: -- Matalon, there's no -- there
13 because Matalon as to, you know, plaintiff's counsel -- but
14 affirming that these cases are identical --

15 THE COURT: Understood. Okay. Anything else?

16 MR. HOLLAWELL: I think I've cited the cases, and,
17 you know, the one case, obviously -- told the defendant --
18 case, once a remand motion is filed, why remand is not
19 proper. So that burden therefore shifts, and in regards to
20 at least the criteria, the -- case, is very clear as to what
21 the court needs to look at as to witnesses, efficiency, the
22 commonality of facts, and the -- case makes it clear that the
23 Court's -- the -- of her name back in state court.

24 THE COURT: Okay. Thank you.

25 All right. Counsel for Insys?

1 MR. SCHWARTZ: Yeah, thank you, Adam Schwartz on
2 behalf of Insys.

3 Your Honor, this case was properly removed to
4 federal court, and the federal court has original
5 jurisdiction under 28 U.S.C. 1332, and it became removable
6 once the plaintiff dismissed the only nondiverse defendant
7 Dr. Matalon.

8 THE COURT: Okay.

9 MR. SCHWARTZ: And that was back in September of
10 last year. And it was removed within the time frame for
11 removal.

12 THE COURT: I don't think there's a dispute there.

13 (Simultaneous conversation)

14 MR. SCHWARTZ: -- original jurisdiction.

15 (Simultaneous conversation)

16 THE COURT: Let --

17 (Simultaneous conversation)

18 MR. SCHWARTZ: -- the plaintiffs were citizens of
19 New Jersey --

20 (Simultaneous conversation)

21 THE COURT: Let me just ask a question --

22 (Simultaneous conversation)

23 MR. SCHWARTZ: -- Delaware corporation.

24 (Simultaneous conversation)

25 THE COURT: Counsel. I don't think there's any

1 | dispute on those issues. I don't think there's any dispute
2 | that the Court currently has diversity jurisdiction.

3 | But at our Rule 16 conference, plaintiff talked
4 | about naming certain executives. I'm just curious, any of
5 | those executives citizens of New Jersey?

6 | MR. SCHWARTZ: They are not, Your Honor.

7 | THE COURT: Okay. So even if those executives are
8 | added to the case, you're saying that the Court would still
9 | have diversity jurisdiction?

10 | MR. SCHWARTZ: I believe it's still -- yes,
11 | Your Honor. Still -- the Court would still have diversity
12 | jurisdiction.

13 | THE COURT: Okay.

14 | MR. SCHWARTZ: And the amount in controversy
15 | certainly exceeds the amount.

16 | THE COURT: Understood.

17 | All right. So please continue.

18 | MR. SCHWARTZ: Thank you, Your Honor.

19 | So this matter, the Fuller matter, was properly
20 | removed pursuant to U.S.C. 1441 and 1446. And the
21 | plaintiff's only argument is that -- is that the Fuller --
22 | and you heard a little bit from plaintiff's counsel about --
23 | of the Matalon case, which is currently pending in New Jersey
24 | state court, should be consolidated and adjudicated in New
25 | Jersey state court.

1 But there's no basis in fact or law for that
2 position. And the Fuller case and the Matalon case are
3 different, which I'll get to in a second, Your Honor.

4 But in order to try to kind of support the remand
5 based on consolidation, the plaintiffs make the following
6 misrepresentations to the Court. The first one -- and this
7 is in the plaintiff's motion for remand -- is that the
8 Camden -- is that when the -- when the Matalon case was
9 transferred from Camden County to Middlesex County on
10 September 5th -- by -- on September 15th, 2017, the plaintiff
11 said that that was done to consolidate Fuller and Matalon.

12 However, that order, which is Exhibit B to the
13 plaintiff's motion to remand, only transferred venue. And
14 Exhibit D, which is Matalon's lawyer's, Mr. Meyerson's
15 request to transfer venue only requested transfer of venue,
16 not to consolidate. And, in fact, no party has requested
17 consolidation.

18 A separate and second misrepresentation -- this is
19 on page 6 of the plaintiff's papers, of their motion to
20 remand -- is that Insys, through counsel, consented to
21 consolidation.

22 That's not true either, Your Honor. There's a --
23 there's a October 13th, 2017, email from Mr. Crawford to
24 counsel for Dr. Matalon, which is Exhibit F. And if you read
25 that email, Your Honor, it only talks about accepting service

1 of the Matalon complaint. There is no mention of
2 consolidation at all.

3 And we've attached Mr. Crawford's affidavit to our
4 moving papers, to our -- to our response, Your Honor, to the
5 motion to remand, which clearly denies any attempt to
6 consolidate.

7 And, Your Honor, in fact, these cases are
8 different, and they should not be consolidated. The type of
9 action is different. Ms. Fuller's action -- the estate of
10 Fuller is a wrongful death claim. Dr. Matalon's state claim
11 is an economic claim for voluntarily surrendering her medical
12 license.

13 The parties are different. The plaintiffs in the
14 estate of Fuller case is the estate and Ms. Fuller's parents.
15 The plaintiff in the Matalon case is Dr. Matalon. And the
16 defendants in both cases are different. The only common
17 defendant in both cases is Insys. That's it. Insys is the
18 sole defendant now in the Fuller case. There are two other
19 defendants in the -- in the Matalon case. There's an
20 individual, and Linden Care still remains a defendant in the
21 Matalon case.

22 The theories of liability, Your Honor, are
23 different. The theories in the Fuller case are that
24 Dr. Matalon knew the risks of Subsys and not -- and that
25 Subsys was not appropriate from Ms. Fuller. There are,

1 obviously, other theories, Your Honor, but the ones that go
2 to the heart of the matter here, include that in the Matalon
3 case, where Dr. Matalon sued Insys in New Jersey state court,
4 she says that Insys tricked her into prescribing Subsys to
5 her patients.

6 Your Honor, the damages are different. The Fuller
7 case seeks damages for wrongful death and survivorship. And
8 the Matalon case seeks damages for economic recovery and
9 voluntarily surrendering her medical license.

10 And I think maybe most importantly, Your Honor, the
11 scope of discovery's going to be significantly different. In
12 the Fuller case before Your Honor, the discovery's going to
13 surround the Subsys prescriptions to Ms. Fuller. We don't
14 agree that all of the -- that all of the officers and
15 executives should be deposed in this case.

16 In the Matalon case, Dr. Matalon surrendered her --
17 voluntarily surrendered her medical license, after the New
18 Jersey attorney general filed a verified complaint. That
19 verified complaint talked about more patients than
20 Ms. Fuller. It talked about other patients who received
21 Subsys under Dr. Matalon's care. And so the discovery there
22 is going to be different than the discovery in the Fuller
23 case, Your Honor.

24 And there was some discussion, Your Honor, about
25 parallel proceedings and in the plaintiff's moving papers

1 about an indispensable -- that Matalon's indispensable to the
2 Fuller matter.

3 But that's not true, Your Honor.

4 (Simultaneous conversation)

5 THE COURT: She was dismissed from this case --

6 (Simultaneous conversation)

7 MR. SCHWARTZ: The last thing -- she was dismissed
8 from this case, Your Honor.

9 THE COURT: All right. Understood.

10 MR. SCHWARTZ: And the -- yeah, and the last case
11 that plaintiff's counsel cited to you was the Owens v.
12 Hartford [phonetic] case, which he cited in its motion to
13 remand, Your Honor. That is a declaratory judgment in that
14 case that discusses parallel proceedings. That has separate
15 requirements. It is a separate act. And he doesn't say that
16 in the moving papers, but when you get into the case, it has
17 separate considerations that are unique to the declaratory
18 judgment action.

19 In his reply to our response, he switches to a
20 definition of parallel proceedings, according to Colorado
21 River Conservation District v. U.S. But that's not -- but
22 that's not an abstention case, Your Honor. And even that
23 case doesn't support plaintiff's remand request, because in
24 an abstention case, the federal court can only remand cases
25 where the relief sought is equitable or discretionary.

1 Here, in the Fuller case, Your Honor, the plaintiff
2 is seeking common law damages. So the Colorado River case is
3 inapplicable. But even if it was applicable, Fuller would
4 not meet the two-part test for a parallel proceeding, because
5 it's not the same parties, Your Honor. Talked about that a
6 little bit earlier, the difference in parties. And they are
7 not substantially identical claims -- in nearly identical
8 allegations and issues. The type of cases are different.
9 It's a wrongful death and survivorship case versus a claim
10 for economic damages for voluntarily surrendering a medical
11 license. Very different claims, Your Honor.

12 But even if that --

13 MR. HOLLAWELL: --

14 MR. SCHWARTZ: I'm sorry, Your Honor. Go ahead.

15 MR. HOLLAWELL: I'm sorry. I didn't know you
16 weren't finished.

17 MR. SCHWARTZ: I'm almost -- almost done,
18 Your Honor.

19 But even if you were to find that they are parallel
20 proceedings under Colorado River, the plaintiff still doesn't
21 get a remand, because it's only a remand if there is -- if
22 the relief sought is equitable or discretionary, not common
23 law damages, like the ones that are being claimed here. And
24 that's the Quackenbush case that we've cited on page 16 of
25 our moving papers, Your Honor, 517 U.S. 706.

1 And just a -- just a couple of other very quick
2 miscellaneous points, Your Honor. The plaintiff references
3 this indispense- -- that Matalon is -- indispensable
4 companion matter that must be consolidated. But if you look
5 at the New Jersey law at NJ 4:38.1, it talks about a court
6 may order consolidation. And that's only if there are common
7 questions of law or fact arising out of the same transaction
8 or series of transactions.

9 Even in the New Jersey law, it is not mandatory or
10 indispensable. As a matter of fact, I've looked for that
11 word "indispensable" in any of the statutes, and I haven't
12 found it regarding a consolidation, Your Honor.

13 The plaintiff briefly mentioned the Court being
14 able to -- being unable to exercise supplemental jurisdiction
15 over Matalon or talked about a -- the case that's the State
16 of New Jersey brought.

17 And we agree with that, Your Honor, and we're not
18 asking for that, and that shouldn't be done, because that's a
19 concept -- supplemental jurisdiction, obviously, only -- to
20 applies to claims in a single case, Your Honor. And we've
21 outlined that in some great detail on page 13 of 16 in our
22 response, Your Honor -- any detail if you want me to --

23 THE COURT: No.

24 MR. SCHWARTZ: And so for those reasons, we would
25 request that the motion to -- be denied, Your Honor.

1 THE COURT: Okay. Thank you.

2 All right. Last word for plaintiff.

3 MR. HOLLAWELL: Yes, Your Honor. The Matalon cause
4 of action against Insys are fraud. Every -- every count
5 mirrors the counts in plaintiff's complaint in the Fuller
6 case.

7 THE COURT: I would certainly agree that the
8 proceedings are related. I'm not so sure they're parallel,
9 with different parties and different theories.

10 But please continue.

11 MR. HOLLAWELL: They're fraud cases, and Matalon --
12 based on the fraud that they committed with the drug rep
13 duping her that this drug was appropriate for chronic pain
14 and not only breakthrough cancer pain. They -- documents.
15 They made a phone call saying that it's the doctor's office
16 calling, and that's why these drugs --

17 It's so related. Dr. Matalon is part of our
18 settlement, must cooperate. She's going to be deposed in the
19 Fuller case, of course. She's a key witness. She's going to
20 be deposed, of course, in her lawsuit against Insys. It's
21 her rep's a key witness in the Fuller case. She's going to
22 be deposed in the Matalon case.

23 The phone call -- you know, the representative from
24 Insys who made the phone call is going to be deposed in those
25 cases, as well as the executives that orchestrated this

1 | scheme. They're going to be deposed in both cases. I don't
2 | know how much more identical these cases can get. It's all
3 | surround Insys's fraud. And the same with the State of New
4 | Jersey's case. They're identifying -- and at least --
5 | identified in our joint discovery plan, the drug rep's drug
6 | manager, Michelle Bradenbach [phonetic]. She's going to be
7 | deposed in the Fuller case. And the same people are going to
8 | be deposed in the State's case, Ebu-Isaac; Bradenbach, her
9 | manager; Kapoor, who's a named defendant. Kapoor's going to
10 | be a named defendant in this case.

11 | It's -- Insys is only seeking this case to be in
12 | this court so it can manipulate any coordination and throw up
13 | roadblocks like it likes to do. And it's well-known across
14 | the country, that's their litigation tactics.

15 | And I asked them, why don't we consolidate these
16 | cases, because it makes sense. They're going to be dragging
17 | these people in -- they're all from out in Arizona --
18 | executives. And there's only one reason they don't want to
19 | do it, and that's to wreak havoc and confusion -- some of the
20 | arguments, efficiency and fairness and, you know, duplication
21 | of costs, et cetera.

22 | So the other thing too is that every case has a
23 | claim for punitive damages -- fraud. Matalon's complaint,
24 | the State's complaint, and Fuller's complaint. And I cited
25 | to a case regarding -- issue, you know, with the punitive

1 damages, and, you know, that's the -- case that clearly the
2 Court looked at the two separate cases, they both had claims
3 for punitive damages, and refused, you know, to exercise
4 jurisdiction in those cases that were consolidated -- damage
5 claims against --

6 So it's plaintiff's position, Your Honor, that
7 Insys was not forthright. They did not mention any of these
8 cases to the Court and purposefully, because their goal is to
9 keep the courts in the dark and do what is -- interest, not
10 the Court's interest, not any plaintiff's interest, for
11 efficiency and for expediency and duplication of costs,
12 et cetera.

13 And I think that's telling, Your Honor, because,
14 like I said -- firm, it's been involved in the State of New
15 Jersey for well over a year with interviewing people, with
16 providing documents to the State well before the lawsuit was
17 filed. Never, ever was it mentioned. They knew that lawsuit
18 was coming and did not mention the Matalon lawsuit when
19 Philip Crawford -- direct contact much before the removal
20 and, you know, after the Matalon matter was settled and did
21 not mention that to the Court. And I think that's very
22 telling, Your Honor.

23 THE COURT: Okay.

24 MR. CRAWFORD: Judge, I have to -- forgive me, for
25 just interrupting. I just can't let my silence be

1 interpreted is consensual to anything that was just said.

2 The state cases are Medicare reimbursement cases
3 involving a variety of patients. There's no unity between
4 that case and this case regarding Ms. Fuller.

5 I'll defer to Mr. Schultz -- Schwartz on the rest
6 of it, Judge. But my firm's involvement in investigating
7 that matter, which was not yet filed when this was removed,
8 is totally unrelated. In fact, there's different lawyers
9 handling it because there's different disciplines. It's not
10 even in the same department of my firm because it's a totally
11 different case. I'll let it go at that.

12 MR. DEWLAND: Judge, if I could just speak up.
13 Mark Dewland from Console & Hollawell.

14 The attorneys general case specifically references
15 Sarah Fuller and the fraud that took place in this case and
16 the complaint. It's part and parcel of the attorney
17 general's case against Insys and John Kapoor. It's -- it's
18 the crux of the State's case. It's the crux of Matalon's
19 case.

20 THE COURT: Okay.

21 MR. DEWLAND: The State's case, Your Honor, it's
22 known, it's a -- violation. It's fraud. And it's the same
23 activity that -- Fuller.

24 THE COURT: Okay.

25 MR. DEWLAND: -- witnesses, the same set of facts,

1 the same -- you know, same activities were committed across
2 the board.

3 THE COURT: Thank you, counsel. I will get you a
4 decision before our next conference.

5 Anything else for plaintiff today?

6 MR. DEWLAND: No, Your Honor, thank you very much.

7 THE COURT: Very well.

8 Anything else for defense?

9 MR. SCHWARTZ: No, thank you, Your Honor.

10 THE COURT: All right. We're adjourned. Be safe.

11 (Conclusion of proceedings at 12:45 P.M.)
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